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No. 94-622

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DOUGLAS GREENE
. . . . . Petitioner

V.

SOUTH CAROLINA ELECTION COMMISSION, THE SOUTH CAROLINA BOARD OF STATE CANVASSERS, THE AIKEN COUNTY ELECTION COMMISSION, THE AIKEN COUNTY BOARD OF CANVASSERS AND LAWANA R. MCKENZIE
. . . . . Respondents

PETITION FOR CERTIORARI TO
THE UNITED STATES SUPREME COURT FROM THE
SOUTH CAROLINA SUPREME COURT

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. DID THE SOUTH CAROLINA STATE SUPREME COURT AND THE SOUTH CAROLINA BOARD OF STATE CANVASSERS CORRECTLY APPLY STATE LAW AND UPHOLD THE ELECTION RESULTS?

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OPINIONS AND JUDGMENTS BELOW

The South Carolina Supreme Court, on June 20, 1994 affirmed the South Carolina Board of State Canvassers June 15, 1993 decision sustaining the election results of the April 27, 1993 Aiken County Council District 3 election results.

The opinion of the South Carolina Supreme Court is a published opinion, Douglas Greene v. South Carolina Election Commission, The South Carolina Board of State Canvassers, The Aiken County Election Commission, The Aiken County Board of Canvassers and Lawana R. McKenzie, No. 24101 (June 20, 1994), and is found in Appendix C of petitioner's Petition for Writ of Certiorari, at pp. 8-14.

The Order of the State Board of Canvassers is not separately published, but has been set out in Appendix B of petitioner's Petition for Writ of Certiorari at pp. 2-7. The State Board of Canvassers affirmed the Order of Aiken County Registration and Election Commission which was

rendered May 6, 1993, which sustained the election results. The Aiken County Registration and Election Commission Order is found in Appendix A of petitioner's Petition for Writ of Certiorari, at p. 1.

The petitioner's Petition for Rehearing was denied by the South Carolina Supreme Court on July 13, 1994. The Order denying the Petition for Rehearing is found in Appendix D of petitioner's Petition for Writ of Certiorari, at p. 15.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257. The South Carolina Supreme Court grounded its opinion solely on a construction of state election law, and not on a federal question. As this Court has consistently ruled, when, "as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state court, unless the aggrieved party in this court can affirmatively show the contrary." Street v. New York, 394 U.S. 576 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945); Chicago, I.L.R. Co. v. McGuire, 196 U.S. 128, 131-133 (1905). In such cases, this Court lacks jurisdiction to consider the issues raised. See Id. The decision below does not decide an important question of federal law which has not been but should be settled by this Court. This Court should deny the Petition for Writ of Certiorari filed by the petitioner.

STATEMENT OF THE CASE

In this election, Respondent Lawana R. McKenzie defeated Petitioner Douglas Greene for the District 3 seat on the Aiken County Council. Petitioner, the Libertarian candidate, has on three separate occasions sought unsuccessfully to overturn the results of that election. In the first instance, the Aiken County Board of Canvassers (hereinafter "County Board") ruled on May 6, 1993 that there was "insufficient evidence of election law violations." Appendix A (hereinafter "State Order"). On appeal, after reviewing the record, considering all arguments, and soliciting additional testimony from election officials, the South Carolina Board of State Canvassers, (hereinafter "State Board"), ruled on June 15, 1993 that: (1) the record was sparse, with none of the eleven voters submitting affidavits having testified; (2) "no challenged ballots were cast" in the election; and (3) under South Carolina law, the Appellant "failed to meet the burden of proof" and also failed to

demonstrate that the alleged errors "would affect the outcome of the election." Appendix, Exhibit B, State Order at 2. Thereafter, on appeal to the South Carolina Supreme Court, that Court ruled, after reviewing the record and fully considering the arguments of the parties, affirmed the decision of the State Election Board and ruled that "It was incumbent upon Greene's pollwatcher to insist the poll manager issue a challenge ballot to voters who questioned their eligibility to vote . . . . the errors in placing voters in districts to which they did not belong were errors which could have been discovered prior to the election. Affidavits of voters who did not insist in voting . . . simply did not rise to the level of a 'challenge' ballot under the statute." Appendix C, pp. 13-14.

SUMMARY OF THE ARGUMENT

The petitioner failed to sustain his burden in producing any evidence that the voters at issue insisted in voting in District 3 and were refused a challenge ballot. Any error in placing voters in districts to which they did not belong were errors that could have been discovered prior to the election, and such does not rise to the level of a Constitutional or Federal Voting Rights violation.

ARGUMENT

I. THE DECISION OF THE SOUTH CAROLINA SUPREME COURT AND THE STATE AND COUNTY BOARDS SHOULD BE SUSTAINED: THE ELECTION RESULTS OF THE AIKEN COUNTY COUNCIL ELECTION SHOULD BE UPHELD.

A. The South Carolina Supreme Court Applied the Correct Legal Standard: Its Decision is Well-Founded on State Law Grounds.

Appeals from the South Carolina State Board of Canvassers may be taken to the South Carolina Supreme Court on a writ of certiorari "only based on the record of the State Board." S.C. Code Ann. § 7-17-270 (1992); see also Sims v. Ham, 275 S.C. 369, 370, 271 S.E.2d 316, 317 (1980) (ruling that Supreme Court's scope of review of decisions of State Board is "limited to correcting errors of law"); Redfearn v. Board of State Canvassers of S.C., 234 S.C. 113, 107 S.E.2d 10 (1959)(same). Unless the findings of fact of the State Board are wholly unsupported by the

evidence, the South Carolina Supreme Court will not review the State Board's findings of facts. Id.

Moreover, it is well-settled in South Carolina that a court will use "every reasonable presumption" in favor of sustaining a contested election. Fielding v. South Carolina Election Com'n, 305 S.C. 313, 317, 408 S.E.2d 232, 234 (1991); Knight v. State Bd. of Canvassers, 297 S.C. 55, 56, 374 S.E.2d 685, 686 (1988). Accordingly, when there is a choice between two inferences, the choice must be made in favor of the validity of the contested election. Trapp v. South Carolina Bd. of State Canvassers, 273 S.C. 163, 169, 255 S.E.2d 670, 673 (1979). The results of an election will be upheld unless the challenger establishes that the alleged election errors "actually appear to have affected the result of the election." Id. See also Drawdy v. South Carolina Democratic Executive Committee, 271 S.C. 415, 247 S.E.2d 806 (1978). Mere "conjecture, speculation, and surmise"

that election irregularities occurred will not suffice. Fielding, 305 S.C. 313, 318, 408 S.E.2d 232, 235.

The South Carolina Supreme Court in accordance with the above legal principles, sustained the election results of the April 27, 1993 Aiken County Council election. It's decision is well-founded on state law grounds.

B. Petitioner Failed to Sustain His Burden.

In Berry v. Spigner, the South Carolina Supreme Court considered whether the losing party had sustained his burden in an election contest. 226 S.C. 183, 190 84 S.E.2d 381, 382 (1954). As in the present case, the protestant in Berry challenged the election results arguing that the managers of the election had allowed certain irregular acts which allegedly affected the outcome of the election. Protestant submitted affidavits to that effect. Id.

In Berry, both the county and state boards found that the protestant had failed to sustain his burden in the election contest. Id. On writ of certiorari, the South Carolina

Supreme Court reviewed the affidavits in detail. 226 S.C. at 187, 188, 84 S.E.2d at 383. These consisted of eleven submissions in which affiants stated facts such as the following: that "on at least 75 to 100 instances" or that with regard to at "least half of the voters," the managers of the election went into voting booths of voters who did not appear to need assistance. Other affiants stated that the election managers accompanied them into the voting booth, and did not allow them to vote for the desired candidate or suggested a candidate for whom to vote. Id. After reviewing the affidavits and the record as a whole, the Court ruled that because of the indefiniteness of the evidence presented, the state and county's actions in sustaining the election results were warranted. Accordingly, the Court sustained the election.

In the instant case, Petitioner submitted 10 affidavits for 11 people. These affidavits are inconclusive. All the affidavits state that the voters presented themselves at the

polls but the poll manager did not allow them to vote in the District 3 County Council election. Appendix C, p. 9. All of the voters were set forth on the official registration roll as eligible to vote in District 2. Id. None of the voters were listed as eligible to vote in District 3. Id. The voters were allowed to vote in the precinct election, but were not allowed to vote in the District 3 county council election. The affidavits do not state that the affiants requested a challenged ballot nor that they were refused a challenged ballot. Id. at 11.

Without more, the South Carolina Supreme Court was compelled to draw all reasonable inferences in favor of sustaining the election results, and did so. As in Berry v. Spigner, supra, the evidence submitted by Appellant by affidavit in the present case is so indefinite that the State Supreme Court's decisions to sustain the election results were warranted.

Petitioner claimed that section 7-13-810 requires the poll manager to issue a challenge ballot when a voter questions the district to which the voter is assigned. See S.C. Code Ann. § 7-13-810. Petitioner is mistaken. As both the South Carolina Election Commission and the South Carolina Supreme Court ruled, in construing this state election law, before issuing a challenge ballot, something more is required. Appendix B at 4; Appendix C at 12. Section 7-13-830 of the South Carolina Code provides in pertinent part that, after the poll manager explains elector qualifications to the voter, "if the person insists he is qualified and the challenge is not withdrawn, his vote shall be received and placed in an envelope on which shall be written the name of the voter." S.C. Code Ann. § 7-13-830 (Law. Co-op 1976 & Supp. 1983).

As the Supreme Court ruled, petitioner's urged construction of state election law would allow voters unhappy with an election result after-the-fact to provide

affidavits for an after-the-fact challenge. Appendix C at 13. On the other hand to require, as the legislative framework does, for all challenges to be made before-the-fact insures the integrity of elections and safeguards the rights of voters. Id.

The South Carolina Supreme Court concluded it was incumbent upon Petitioner's pollwatchers to "challenge the vote of any person who may be known or suspected not to be a qualified voter. . . . " S.C. Code Ann. § 7-13-830. They did not do so. Appendix C, at 13. See also Fielding v. South Carolina Election Com'n, 305 S.C. 313, 318, 408 S.E.2d 232, 235 (1991)(the "making of a challenge is essential to an adequate preservation of an appellate record upon which appellate review can be had.") Petitioner's pollwatchers did not challenge the ballots of any voters. Accordingly, despite Petitioner's assertions after-the-fact that none of the voters were issued challenged ballots, the duty to challenge ballots rested squarely on petitioner's

pollwatchers. Furthermore, as the South Carolina Supreme Court declared in Hill v. South Carolina Election Comm'n, 304 S.C. 150, 403 S.E.2d 309 (1991),

> The discrepancies between the district where a voter actually resided and the district designation on the voter registration lists could have been discovered prior to the election. Further, we see no reason why a challenge could not have been made at the time a voter was given a ballot for a different district than the one which appeared on the registration list.
>
> The reason for requiring a contemporaneous challenge to a ballot is made clear by the conclusion of the State Board that it could not assume that the forty persons identified as being registered to vote in the wrong district were all actually given correct ballots at the polls. Had a challenge been raised . . . at the time a ballot was dispensed, there would be no need to make assumptions of any kind, since the challenged ballot would have been segregated and a record made of the determination of the challenge.

304 S.C. at 152, 403 S.E.2d at 310 (emphases added). Having failed to take the necessary steps to document the

record at the time the ballots were being cast, the evidence in the record is indefinite at best.

In fully considering the record and argument of the parties, and applying settled principles of state election law, the South Carolina Supreme Court properly concluded that petitioner had not sustained his burden. The state court, therefore, sustained the election results.

II. THE ACTIONS COMPLAINED OF DO NOT VIOLATE THE SOUTH CAROLINA OR FEDERAL CONSTITUTIONS NOR THE VOTING RIGHTS ACT.

As set forth under the jurisdictional section of this brief, it is doubtful that this Court has jurisdiction of this matter as the South Carolina Supreme Court grounded its decision to sustain the election results solely on the construction of state law, and not upon a federal question. Illinois v. Gates, 462 U.S. 213 (1983); Street v. New York, supra; Chicago & L.R. Co. v. McGuire, supra.

Petitioner alleges, inter alia, that election officials' interpretation of the challenge ballot statute violated South Carolina Constitution Article I, Sections 1, 3 and 5; Article 2 Sections 1, 2, and 4; the Federal Voting Rights Act; and, the United States Constitution. Petitioner's Brief at 23-24. Contrary to petitioner's assertion, there is no evidence in the record of such violations. Rather, there is evidence that the April 27, 1993 Aiken County Council election was regularly conducted under the laws of this State, and that the poll managers did not deny any voter a right to vote. As the South Carolina Supreme Court declared, "In order to protect the voter's right to vote and also insure the integrity of the election, the Legislature required the voter 'insist' upon casting a challenge ballot." Appendix C at 13. Accordingly, the state court concluded that the poll managers acted appropriately.

The alleged actions of the poll managers do not constitute a "test or device" as defined by the Federal Voting

Rights Act. See 42 U.S.C. § 1973b(c). The Voting Rights Act was not violated by virtue or the events alleged by petitioner. Petitioner's claims of constitutional violations are equally unfounded.

CONCLUSION

The South Carolina Supreme Court properly ruled on petitioner's claims. Based on all the foregoing, as well as the argument and law set forth in the Brief in Opposition submitted on behalf of the State of South Carolina, respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

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